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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

INGRID CHARLET,

Plaintiff and Appellant,

v.

JAMES A. KAY, JR.,

Defendant and Respondent.

B247617

(Los Angeles County
Super. Ct. No. SC116307)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Cesar C. Sarmiento, Judge. Affirmed.

Fischbach & Fischbach and Zachariah E. Moura for Plaintiff and Appellant.

Parker, Milliken, Clark, O'Hara & Samuelian and David K. Eldan for Defendant
and Respondent.

INTRODUCTION

Plaintiff Ingrid Charlet appeals from the judgment dismissing her complaint after the trial court sustained the demurrer of defendant James A. Kay, Jr. and denied plaintiff leave to amend. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiff's complaint*

For purposes of review, we assume the truth of the following allegations extracted from the first amended complaint (the complaint). (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1141, disapproved on another point in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 484.) Plaintiff and her husband Hans Charlet lived in Germany. Hans¹ sister, Annedore Pick, became the sole owner of property located at 350 Mesa Road, Santa Monica, California (the property) when her husband died in 1995.

Around February 23, 1996, Pick conveyed half of the property to Hans for no consideration. The deed recites: "THIS IS A BONAFIDE GIFT AND THE GRANTOR RECEIVED NOTHING IN RETURN, R & T 11911." By mistake, the grant deed placed the property in a joint tenancy rather than a tenancy in common (the joint tenancy deed).

On July 1, 1996, Pick employed a paralegal service to set up a trust for herself and Hans into which they planned to transfer the property. By mistake, the paralegal service identified the transferee as Pick individually, rather than the trust (the transfer deed). Neither Pick, Hans, nor plaintiff understood the discrepancy because of their lack of sophistication and because plaintiff and Hans did not speak English. Hans signed the transfer deed and returned it to Pick. However, after further deliberation, the two decided not to create the trust. Instead of destroying the transfer deed, however, Pick merely removed the notary seal, believing that would render the deed incapable of recordation. Pick placed all of the paperwork in a filing cabinet on the property.

¹ We refer to Hans by his first name and mean no disrespect thereby.

On May 17, 1997, Kay arranged for the sheriff to execute on a judgment he held against Pick's son Harold, who lived on the property. Among other things seized by the sheriff's deputies was the filing cabinet with the transfer deed.

Kay had also successfully sued Pick and Hans (*Kay v. Pick* (Super. Ct. L.A. County, 1998, No. SC042164).) In that action, Kay obtained a default judgment against Hans and a summary judgment against Pick, and so on July 9, 1998, pursuant to court order, Kay recorded the transfer deed. Thus, as of July 9, 1998, any interest Hans had in the property was transferred back to Pick by the transfer deed and he no longer had any ownership interest in the property.²

Hans died on October 8, 2011, and left his estate to plaintiff. After her husband's death, plaintiff contacted Pick to inquire about the half-interest in the property she inherited from Hans. Around the second week of October 2011, Pick sent Harold to the Los Angeles County Recorder's Office to verify Hans' interest. That is when everyone learned that the transfer deed had been recorded, effectively transferring Hans' one-half interest back to Pick.

Plaintiff, as Hans' widow, filed her complaint in this action seeking (1) cancellation of the transfer deed, (2) partition of the property, or if sold at a sheriff's sale, partition of the proceeds, and (3) declaratory relief. Plaintiff alleges in the third cause of action that an actual controversy exists in that she contends the joint tenancy deed mistakenly names Pick and Hans as joint tenants of the property, whereas their ownership should be identified as tenants in common with a life estate reserved to Pick. Plaintiff also seeks a declaration that the paralegals mistakenly drafted the transfer deed to convey Hans' ownership back to Pick rather than placing it in a trust. Plaintiff asks for a declaration restoring title as originally intended, and a declaration that Kay is not entitled to a judicial foreclosure, as plaintiff "never had due process" in *Kay v. Pick, supra*,

² Pick filed two successive voluntary petitions for bankruptcy protection to stay the sale of the residence. Both cases were dismissed.

No. SC042164 because Hans was not properly served with process under the Hague Convention.

2. *Kay v. Pick*, *supra*, No. SC042164

As explained, in *Kay v. Pick*, *supra*, No. SC042164, of which we may take judicial notice, Kay sued to set aside as fraudulent transfers two conveyances of the property by Pick. One of the two conveyances at issue in that case was the joint tenancy deed. The trial court determined that Pick had fraudulently transferred her sole asset with the intention of defeating the claims of Kay, defendant here, as her creditor. (Civ. Code, § 3439.07, subd. (a)(1).)³ The judgment in case No. SC042164 declaring the joint tenancy deed to be a fraudulent transfer was affirmed by Division Two of this District Court of Appeal in an unpublished opinion filed in 2000 (*Kay v. Pick* (May 8, 2000, B128555) [nonpub. opn.]). The appellate court also affirmed the award of punitive damages to Kay. The effect of that final judgment is that the joint tenancy deed was voided nearly 15 years ago.

3. *The demurrer*

Kay demurred to the instant complaint on the ground that plaintiff failed to state causes of action (Code Civ. Proc., § 430.10). He argued that plaintiff's attempt to cancel the transfer deed was barred by the statute of limitations; the transfer deed was executed and delivered, and hence effectively recorded; and the undisclosed intentions of Pick and Hans cannot alter the unambiguous legal consequence of the transfer deed. Next, Kay argued the cause of action for partition failed because only those with ownership or estate interests in property may seek partition, and plaintiff has no interest in the property. The third cause of action for declaratory relief is derivative of the first two causes of action, Kay argued, with the result, because plaintiff cannot state causes of action for

³ Civil Code section 3439.07, subdivision (a)(1) reads, "In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain: [¶] (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim."

cancellation and partition, she has no interest in the property and hence no right to a declaration that she has an ownership interest.

The trial court sustained the demurrer without leave to amend and dismissed the complaint. The court ruled, although plaintiff properly stated a cause of action for cancellation of the transfer deed, that her case hinged on whether she could state a cause of action for reformation of the deed from a joint tenancy to a tenancy in common. The court rejected plaintiff's argument that the deed created a rebuttable presumption that the property was held in a joint tenancy. Finding the deed was clear on its face, the court ruled that it would be impossible to prove plaintiff's claim 15 years after its recordation, that the parties did not intend the deed to create a joint tenancy, given Hans was dead. Plaintiff's timely appeal ensued.

CONTENTION

Plaintiff contends the trial court abused its discretion in sustaining the demurrer and denying leave to amend.

DISCUSSION

On appeal from an order sustaining a demurrer without leave to amend, “[w]e give the pleading a reasonable interpretation and treat the demurrer as admitting all material facts properly pleaded. [Citation.] We do not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.]” (*Guerrero v. Pacific Gas & Electric Co.* (2014) 230 Cal.App.4th 567, 571.) “ ‘We also consider matters which may be judicially noticed.’ [Citation.]” (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

“The judgment ‘must be affirmed if any one of the several grounds of demurrer is well taken.’ [Citation.] . . . Nevertheless, if no liability exists as a matter of law, we must affirm that part of the judgment sustaining the demurrer, and if the plaintiff cannot show an abuse of discretion, the trial court’s order sustaining the demurrer without leave to amend must be affirmed. [Citation.] ‘The burden is on the plaintiff . . . to demonstrate the manner in which the complaint might be amended. [Citation.]’ [Citation.]” (*Guerrero v. Pacific Gas & Electric Co.*, *supra*, 230 Cal.App.4th at p. 571.)

As context, any interest plaintiff has in the property is as heir to Hans. Hans' interest in the property in turn depends on the February 23, 1996 joint tenancy deed, the first conveyance Pick made to Hans. According to the plain language of that deed, Hans' interest was that of a joint tenant. Upon his death in 2011, his interest reverted to Pick, with the result there nothing for plaintiff to inherit. (*Estate of Mitchell* (1999) 76 Cal.App.4th 1378, 1385 ["when one joint tenant dies, the entire estate belongs automatically to the surviving joint tenant(s)."].) The trial court was therefore correct that plaintiff's ability to obtain any relief on this complaint depends on whether she can reform the deed from a joint tenancy to a tenancy in common under which plaintiff would inherit Hans' interest upon his death. With this context in mind, we turn to the three causes of action.

1. *Declaratory relief*

Plaintiff seeks a declaration that the joint tenancy deed mistakenly granted Hans an ownership interest as a joint tenant rather than a tenant in common.⁴ Plaintiff cannot state a cause of action. " 'To qualify for declaratory relief, [a party] would have to demonstrate its action presented two essential elements: "(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [the party's] rights or obligations." ' [Citation.]" (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909.) Plaintiff's complaint alleges an actual controversy has arisen because the parties disagree about whether the joint tenancy deed conveyed the property to Pick and Hans as joint tenants or as tenants in common.

⁴ Plaintiff insists that her cause of action for declaratory relief is not an action to *reform* the joint tenancy deed. However, "California courts employ the 'primary rights' theory to determine the scope of causes of action. [Citation.] Under this theory, there is only a single cause of action for the invasion of one primary right. In determining the primary right, 'the significant factor is the harm suffered.' [Citation.]" (*Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 904, disapproved on other grounds in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 72.) Although entitled declaratory relief, the actual relief plaintiff seeks is a declaration that would reform the joint tenancy deed to grant Pick and Hans ownership as tenants in common.

However, we conclude, based on the allegations of the complaint and on matters which may be judicially noticed (*Evans v. City of Berkeley*, *supra*, 38 Cal.4th at p. 6), that the trial court properly sustained the demurrer without leave to amend, although for a different reason than that given by the trial court.⁵ The joint tenancy deed, upon which plaintiff bases her ownership interest and hence her entire lawsuit, was judicially determined to be a fraudulent transfer 11 years before Hans' death by the court in *Kay v. Pick*, *supra*, No. SC042164. The effect of that final judgment is that whatever quantum of property interest Hans had by virtue of the joint tenancy deed was avoided in 2000. (Civ. Code, § 3439.07, subd. (a)(1).) It has long been the law in California that "A judgment in favor of a creditor, in a fraudulent conveyance action such as the one at bench, sets aside the conveyance insofar as it affects the creditor" (*Patterson v. Missler* (1965) 238 Cal.App.2d 759, 770.)

Plaintiff argues in her letter brief that the fraudulent conveyance action was ineffective as against Hans. First, she argues that the judgment setting aside the transfer as a fraudulent conveyance, although operative as against Pick, did not void Hans' interest in the property. Plaintiff is partially correct.

"A grant made in fraud of creditors is valid between the parties and to all the world *except* as to the creditors of the grantor. [Citations.]" (*Abbey v. Zimmerman* (1936) 12 Cal.App.2d 311, 318-319, *italics added*; *Patterson v. Missler*, *supra*, 238 Cal.App.2d at pp. 770-771, citing *McGee v. Allen* (1936) 7 Cal.2d 468, 476.) Accordingly, the conveyance to Hans would indeed be valid as between Pick and Hans in that neither of them could unravel the conveyance. However, where plaintiff strays is that Hans' ownership interest as grantee was nonetheless subject to Kay's rights as Pick's creditor. Hans, as grantee, took whatever interest Pick had, "qualified only by the interest of the creditors" (*Abbey v. Zimmerman*, *supra*, at p. 319; accord, *Heffernan v.*

⁵ Because we are reaching a conclusion not addressed by the trial court or in the appellate briefing, we requested the parties submit letter briefs concerning the effect on this case of the final judgment in *Kay v. Pick*, *supra*, No. SC042164 and *Kay v. Pick*, *supra*, No. B128555. (Gov. Code, § 68081.)

Bennett & Armour (1952) 110 Cal.App.2d 564, 585; *Ramirez v. Hartford Acc. & Indem. Co.* (1938) 29 Cal.App.2d 193, 196-197.)

Plaintiff next argues, as she alleged in the complaint, that Hans was never properly served with process in *Kay v. Pick, supra*, No. SC042164, with the result the fraudulent transfer judgment is ineffective as to him. Accepting that allegation in the complaint as true, the result remains the same. If on the one hand, Hans *participated* in Pick's fraud, then his rights are inferior to those of Kay, Pick's creditor. He is not entitled to hold the property as security for the amount he paid for it, and Kay is not required to reimburse him for his purchase price. (16A Cal.Jur.3d (2003) Creditors' Rights & Remedies, § 402, pp. 502-503.) If, on the other hand, Hans obtained his joint tenancy interest in the property without fraudulent intent and is otherwise innocent of wrongdoing, then he is protected *only to the extent of his investment*. (*Patterson v. Missler, supra*, 238 Cal.App.2d at p. 771.) As noted, the joint tenancy deed attached to the complaint shows that *Hans made no investment in the property; his interest was deeded as a gift*.

To summarize, although Hans as grantee of the joint tenancy deed from Pick took an ownership interest in the property, the transfer was subject to attack by Kay as Pick's creditor. Kay obtained a final judgment against Hans and Pick in *Kay v. Pick, supra*, No. SC042164 (*Kay v. Pick, supra*, No. B128555). The final judgment set aside as a fraudulent transfer the very deed upon which plaintiff stands in order to bring this lawsuit. (Civ. Code, § 3439.07, subd. (a)(1).) Even if the fraudulent transfer judgment was void as to Hans for lack of personal jurisdiction, the result is the same. If he was complicit in the fraud, then his investment in the property was entitled to no protection. If Hans was otherwise innocent of wrongdoing, then he was protected *only to the extent of his investment*, which was zero. Either way, there being no ownership interest for plaintiff to reform by declaration, as a matter of law, plaintiff has no right to relief. Nor can plaintiff demonstrate an amendment to the complaint that would enable her to state a cause of action to reform the joint tenancy deed. The trial court properly sustained the demurrer to the declaratory relief cause of action and denied plaintiff leave to amend.

2. *Partition*

Plaintiff cannot state a cause of action for partition. In California, “partition of real property is a special statutory proceeding available only under circumstances authorized by Code of Civil Procedure The action may be maintained only by a person having the interest described by statute. [Citations.]” (*Powers v. Powers* (1963) 221 Cal.App.2d 746, 748.) Code of Civil Procedure section 872.210 provides in relevant part, “(a) A partition action may be commenced and maintained by any of the following persons: [¶] . . . [¶] (2) An owner of an estate of inheritance, an estate for life, or an estate for years in real property where such property or estate therein is owned by several persons concurrently or in successive estates.” Partition “does not involve a transfer of title; the parties already have the title, and their common title is merely being divided.” (5 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 12:14, p. 12-33, fn. omitted.) Thus, for plaintiff to state a cause of action for partition, she must demonstrate she is “[a]n owner of an estate” in the property (Code Civ. Proc., § 872.210, subd. (a)(2)).

As plaintiff cannot state a cause of action to reform the joint tenancy deed into a tenancy in common enabling her to inherit Hans’ interest, she has no ownership interest in the property such as would enable her to seek partition (Code Civ. Proc., § 872.210). The trial court therefore properly sustained the demurrer to the second cause of action. Moreover, as no amount of amendment would enable plaintiff to establish an ownership interest in the property, the trial court did not abuse its discretion in denying plaintiff leave to amend.

3. *Cancellation of the transfer deed*

The trial court did not sustain the demurrer with respect to the first cause of action for cancellation of the transfer deed. However, we conclude plaintiff cannot state a cause of action. The allegations of the complaint are that the transfer deed mistakenly transferred Hans’ interest in the property to Pick, rather than into a trust. Such interest in the property is predicated on the earlier-executed joint tenancy deed. Even were the transfer deed cancelled restoring Hans’ interest to him, by the time of his death, he had no interest in the property under the joint tenancy deed for plaintiff to inherit. Plaintiff is

entitled to no relief as a matter of law, with the result we affirm the order sustaining the demurrer. As plaintiff cannot demonstrate an amendment that would save this complaint, the trial court's order denying leave to amend is affirmed. (*Guerrero v. Pacific Gas & Electric Co.*, *supra*, 230 Cal.App.4th at p. 571.)

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

KITCHING, J.